IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 431 OF 2006.

Manjula Bachu Patel. .. Appellant.
V/s.
Nelson @ Nana Albert D'Cruz... Respondent.

Shri Bharat Joshi for the appellant.
Shri G.K. Karkera for the respondent.

CORAM : A.M. KHANWILKAR, J.

DATED : 14.8.2006.

P.C. :

. Heard Counsel for the parties.

2. Admit. Shri Karkera waives notice for the respondent. As short question is involved in this appeal, appeal is taken up for final hearing forthwith by consent.

3. This appeal takes exception to the judgment and order dated 25th April 2006 in Notice of Motion No. 927 of 2006. By this order, the Court below dismissed the notice of motion preferred by the appellant for setting aside the order passed on 6th February 2006 dismissing the suit for default. On 6th February 2006, the suit was dismissed for default essentially because the plaintiff was absent consistently and that he was seeking time for filing affidavit of evidence in spite of sufficient time granted. Interestingly, in the order it is noted that the Advocate for the plaintiff is present and

produced a letter dated 24.10.2004 along with RPAD card to show proof of service of affidavit of evidence on the defendants. There is nothing on record to suggest that the defendant was not served with the said affidavit nor this position was contested on behalf of the defendant. The Court yet proceeded to dismiss the suit for default. On the same day at 2.30 p.m. application was moved by the plaintiff for restoration of the suit. However, it appears that neither the plaintiff nor his advocate were present when said application was heard. The Court, proceeded to record that the application was not supported by any medical papers nor was the plaintiff present. Hence, application for restoration was rejected. Hence, appellant-plaintiff took out Notice of Motion No. 927/2006 for recalling the order passed on 6.2.2006.

4. It appears that respondent-defendant did not contest the motion. Inspite of that the Court below proceeded to reject the motion relying upon decision of the High Court in the case of K.R. Singh vs. Smt. A.G. Thakur & ors. reported in 1991(2) Bom.C.R.658, wherein it is held that misplaced sympathy and charitable approach should not be the course of action to be adopted. The question is: whether the exposition in the said decision would apply to the facts and circumstances of this case. In the present case, however, it is seen that the

Court below has proceeded on erroneous assumption that the defendant was not served with affidavit of evidence. Record however, showed that defendant was duly served with affidavit of evidence on 23rd October 2005 and Advocate for the defendant was also served with affidavit of evidence on 4th February 2006. Inspite of that, the Court proceeded to dismiss the suit on 6th February 2006. More so, even after recording that Advocate for the plaintiff had produced letter dated 24th October 2005 along with RPAD card to show that affidavit of evidence was served on the defendant.

5. The Court below has committed manifest error in dismissing the suit for default on 6th February 2006 and that too by passing order when advocate for the plaintiff was present. Indeed, plaintiff or his Constituted Attorney was absent on that day. However, it does not mean that matter was not pursued by plaintif with diligence. In my opinion, taking overall view of the matter, the view taken by the Court below cannot be sustained and the same is accordingly set aside and the Notice of Motion No.927 of 2006 filed before the lower Court is made absolute in terms of prayer clauses (a) and (b).

6. The suit is restored to file of the trial Court to itrs original number. The trial Court shall proceed with the suit expeditiously as the

matter pertains to year 1997. This observation is made on the basis of the assurance given by the parties through their Counsel before this Court that they will extend full cooperation for early disposal of the suit and they will not ask for any adjournment.

(A.M. KHANWILKAR,J.)